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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/960,114	09/21/2001	Kenneth B. Higgins	5113B	5752

7590 12/09/2004

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EXAMINER

JUSKA, CHERYL ANN

ART UNIT PAPER NUMBER

1771

DATE MAILED: 12/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/960,114

Applicant(s)

HIGGINS ET AL.

Examiner

Cheryl Juska

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 88,90-128,130-132,134-136,138 and 149 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 88,90-128,130-132,134-136,138 and 149 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☒ Interview Summary (PTO-413)
Paper No(s)/Mail Date 12/04
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed September 23, 2004 has been entered. Claims 91, 92, 94, 99, and 118 have been amended as requested. New claim 149 has been added. Claims 1-87, 89, 129, 133, 137, and 139-148 are cancelled. Thus, the pending claims are 88, 90-128, 130-132, 134-136, 138, and 149.
2. Said amendment is sufficient to withdraw the 112, 1st rejection set forth in section 6 of the last Office Action.

Claim Rejections - 35 USC § 103

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
4. Claims 88, 90-128, 130-132, 134-136, and 138 stand rejected under 35 USC 103(a) as being unpatentable over US 4,552,857 issued to Higgins in view of US 5,610,207 issued to DeSimone et al. for the reasons of record.
5. Claim 149 is rejected under 35 USC 103(a) as being unpatentable over US 4,552,857 issued to Higgins in view of US 5,610,207 issued to DeSimone et al.

New claim 149 limits the carpet tile of claim 111, wherein the layer of compressible particles is a rebond foam. The limitation of cushion layer of rebond foam has been previously addressed in the prior Office Action. Hence, claim 149 is rejected for the reasons of record.

Response to Arguments

6. Applicant's arguments and the Kilpatrick Declaration have been considered in full, but have not been found to be persuasive. While said arguments and declaration establish the accepted wisdom in the art that rebond foam would not be suited for carpet tiles due to the lack of uniformity in thickness and density which produces a reduced strength and durability, the assertion of unexpected results has not been clearly established. Specifically, the declaration states, "It was surprising and unexpected that rebond foam would work as well as virgin polyurethane foam in a carpet tile." (Declaration, page 2, section 21). However, said declaration does not quantitatively describe said unexpected results. Additionally, while applicant argues carpet tiles having the same construction as the Milliken Comfort Plus[®] cushion back carpet tiles with the exception of the rebond foam layer were found to have similar performance characteristics, said arguments do not quantitatively describe the unexpected results. In other words, applicant has not clearly established the two carpet tiles having identical constructions other than the foam cushion backing (i.e., rebond vs. virgin polyurethane) have similar performance characteristics. It is well settled that unexpected results must be established by factual evidence. "Mere argument or conclusory statements in the specification does not suffice." *In re De Blauwe*, 222 USPQ 191. It is this equivalent performance that is unexpected in view of the accepted wisdom in the art that rebond foam is inferior to virgin foam in strength, durability, uniformity, etc.

7. As previously suggested in the prosecution of related application, 09/721, 871, it is recommended that applicant submit a signed declaration describing in detail the construction of each carpet tile (e.g., face yarn composition and denier, face weight, thickness, and density,

primary backing construction and weight, pre-coat layer composition and weight, hot melt composition and weight, reinforcement layer construction and weight, foam cushion back composition, weight, thickness, and density, and backing layer construction and weight). Said declaration should also include the results of performance tests that reflect the cushion layer of the carpet tile (e.g., cushion resilience, Herzog walking comfort rating, castor chair test, Gmax, etc.). It is noted that the scope of said declaration would establish the scope of allowable subject matter. For example, if the two carpet tiles are equivalent in all aspects except the foam composition (i.e., thickness and density of foam are alike), then the allowable subject matter would be a carpet tile having a rebond foam backing. However, say the two carpet tiles differ with respect to the foam layer composition and average foam density, then the scope of the allowable subject matter would be a carpet tile having the rebond foam layer and a specified foam density.

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,


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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

10. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


CHERYL A. JUSKA
PRIMARY EXAMINER